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IN THE

Supreme Court of the United States

NO. [redacted]24 OCTOBER TERM, 1934

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Nancy K. McFeely respectfully represents:

Summary Statement of Matter Involved.

Your petitioner requests this Court to review the judgment of the Circuit Court of Appeals of the Third Circuit entered on December 10, 1934, which for the purpose of the right of appeal became final on January 18, 1935, when the Circuit Court of Appeals entered an order refusing the application of the Petitioner for a Re-hearing.

This case involves a determination as to whether your petitioner is entitled to the benefits of the capital gain provisions of the Revenue Act of 1928, she being a donee of an interest acquired from the widow on August 1, 1925, in the Estate of a decedent who died June 28,

1919, and from the executors of which estate she received on November 3, 1927 personal property, part of her interest, which she sold at a profit on March 14, 1929.

There is no dispute as to the facts in this case and they are fully set forth in the Findings of Fact of the Board of Tax Appeals, (R. 17). The issue can thus be limited to the opposite views of the petitioner and respondent in construing the law as applied to the facts.

The legal question raised is whether the two-year holding period provided by the capital net gain provisions of the Revenue Act of 1928 begins from the date of death of the testator, when title is acquired, or begins from the time of distribution, the base date for determining gain or loss to the residuary distributees.

The pertinent law to determine "capital assets" is found in the Revenue Act of 1928 (R. 25-26).

"Section 101. *Capital net gains and losses*

* * * * * * *

c (8) "Capital Assets" means property held by the taxpayer more than two years. * * * For the purposes of this definition—.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of Section 113, such property has, for the purpose of determining the gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

and the pertinent law to determine gain or loss is found in

"Section 113. Basis for determining gain or loss.

* * * * * * *

(5) Property transmitted at death.

* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

The petitioner sold on March 14, 1929, said stock which she had acquired from the Estate of T. H. Given at a considerable profit, and in filing her Federal income tax return for the year 1929, claimed that the profit on the sale of this stock was capital net gain from the sale of capital assets. The stock was not a specific bequest, but was part of the residuary assets delivered to the petitioner by the executor under order of the Orphans' Court dated November 3, 1927. She had actual possession of the certificates less than two years, but the date of acquisition of her title to them, for the purposes of this case, was the date of decedent's death in 1919.

The respondent, using November 3, 1927, the time of distribution as the basic date for gain or loss, as well as the beginning of the two year capital gain period, determined there was an ordinary profit on the sale in question, holding that the date which governs for gain or loss purposes should be used also for capital gain determination. (R. 13-14). This determination was followed by an assessment for a deficiency of $35,372.53 in petitioner's Federal income tax for the year 1929, which amount was the difference between the tax assessed on ordinary profit and the tax on capital net gain.

The Board of Tax Appeals on February 2, 1934, passed upon the question raised in the case at bar, and for the first time construed Sections 101 and 113 of the

Revenue Act of 1928, as sustaining the contention of respondent that the date of distribution which governs for gain or loss purposes should be used also for capital gain determination. The Board of Tax Appeals followed this construction on February 13, 1934, in the case of *Isabel K. Dibblee v. Helvering,* 29 B. T. A. 1070, and again on February 20, 1934, in an unpublished Memorandum Opinion in the case of *Frances G. Lee v. Helvering,* Docket No. 65705, in which the Board says:

> "The question here presented for our determination is controlled by the Board's decisions in *Nancy K. McFeely,* 29 B. T. A. 998, promulgated February 2, 1934, and *Isabel K. Dibblee,* 29 B. T. A. 1070, promulgated February 13, 1934. We held in those cases that the date of distribution of securities to the legatee or devisee determines the beginning of the period for which they shall be deemed to have been held by such distributee for the purpose of determining the applicability of Section 101 of the Revenue Act of 1928. Upon authority of those cases we hold the securities in question were not held by the petitioner for more than two years within the meaning of Section 101 (c) (8), and that the petitioner is not entitled to report the profits from the sale of the securities in question as capital net gain."

The Board of Tax Appeals later in unpublished Memorandum Opinions took the same action in the following cases:

Elizabeth R Stone v. Helvering, Docket 53902, now on appeal in the Second Circuit.

Rufus R. Rand v. Helvering, Docket 60784, now on appeal in the Eighth Circuit.

Kate A. Ogle v. Helvering, Docket 60785, now on appeal in the Second Circuit.

The Circuit Court of Appeals in different Circuits has both affirmed and reversed the decision and order of the Board of Tax Appeals and Respondent.

In the McFeely case at bar, the Third Circuit on December 10, 1934, affirmed the decision of the Board of Tax Appeals. The Ninth Circuit on February 5, 1935, affirmed the Board of Tax Appeals decision in the case of *Isabel K. Dibblee v. Commissioner*, 29 B. T. A. 1070.

The First Circuit on March 9, 1935, reversed the Board of Tax Appeals in the case of *Frances G. Lee v. Commissioner*, Docket No. 65705, having upon the same day, upon the same question likewise reversed the District Court of Massachusetts in the case of the *First National Bank of Boston, et al., v. United States of America*, 7 F. Supp. 915.

Your petitioner contends that the time of acquisition of title to property is the ruling element in determining "capital assets" and that under the rule laid down in *Brewster v. Gage*, 280 U. S. 327, as to the date of acquisition, the stock sold by her had been acquired and held by her donor from the date of decedent's death, June 28, 1919, until the date of the gift and by petitioner from the time of the gift until the sale on March 14, 1929, a continuous holding period of over nine years, bringing it clearly within the definition of property "held by the taxpayer for more than two years," and therefore the profit thereon is capital net gain and should not be taxed as ordinary net income.

The Circuit Court of Appeals and the Board of Tax Appeals erred when they decided that the acquisition of possession was the controlling element rather than acquisition of property rights; that the stock had not been held for more than two years; that the profit on its sale was ordinary net income, and that it should be

so taxed. The judgment in favor of respondent should be reversed.

Reasons Relied on for the Allowance of the Writ.

I. The Circuit Court of Appeals has decided an important question of Federal Tax law which has not been but should be settled by this Court.

II. If this question is not settled by this Court, profit arising out of the same kind of transactions will be taxed as ordinary net income in the Third and Ninth Circuits and as capital gain in the First Circuit, and the taxes will not be uniform.

III. The Circuit Court of Appeals for the First Circuit has rendered decisions on the same matter which are in direct conflict with this decision of the Third Circuit, and a like decision of the Ninth Circuit.

IV. This decision of the Circuit Court of Appeals is in conflict with the weight of authority and with the applicable decisions of this Court.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case of *Nancy K. McFeely, Petitioner v. Commissioner of Internal Revenue, Respondent,* No. 5545 October Term, 1934, and that the judgment of said United States Cir-

cuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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BRIEF.

Opinions of Courts Below.

The opinion of the Board of Tax Appeals, (R. 23) is reported in 29 B. T. A. 998. The percuriam opinion of the Circuit Court of Appeals for the Third Circuit (R. 56) is unreported.

Jurisdiction.

1. The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 10, 1934 (R. 56) and its order denying the petition for re-hearing was entered on January 18, 1935, (R. 64).

2. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936,938.

Statement of the Case.

The facts in this case are not disputed and were stipulated. See (R. 34) and Findings of Fact by U. S. Board of Tax Appeals (R. 16). The facts relevant to the issue raised are as follows:

The petitioner received as donee from her mother, Martha A. Given, as donor, on August 1st, 1925, an absolute assignment of one-tenth of the donor's interest in one-half of the estate of her husband, T. H. Given, which she elected to take against his will and was awarded at the time of his death on June 28, 1919, under the laws of Pennsylvania. The validity of the instruments evidencing the gift was recognized by the Orphans' Court in which the estate of Mr. Given was being administered, and distribution was decreed in accordance therewith.

On November 3, 1927, the Court ordered the distribution to the petitioner, *inter alia,* of 1000 shares of Radio "A" common stock, which were being held by the Executors as part of the residuary Estate.

Petitioner sold said stock on March 19, 1929, at a large profit, and in her 1929 Income Tax Return, she returned this profit as capital net gain and claimed the benefit of the capital gain provisions.

The Respondent determined (R. 13) that there was an ordinary profit on the sale of said stock because under Section 101 (c) (8) of the Revenue Act of 1928, the donor's holding period shall be added to the donee's holding period to determine "capital assets" and under Section 113 (2) property acquired by gift after December 31, 1920, shall take the same basis as in the hands of the donor to determine gain or loss, and it would be inconsistent to hold that the stock sold was in the donor's hands prior to November 3, 1927, the date of the decree of distribution. Therefore, the date which governs for gain or loss purposes should be used also for capital gain determination. Respondent assessed an additional tax against Petitioner for $35,372.53, from which petitioner appealed.

The Board of Tax Appeals sustained Respondents' contention and entered judgment for Respondent.

The Circuit Court of Appeals for the Third Circuit affirmed the order of the Board of Tax Appeals.

Specifications of Error.

FIRST. The Circuit Court of Appeals erred in affirming the judgment of the Board of Tax Appeals.

SECOND. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the first assignment of error, to-wit:

(1) The determination that the profit realized by the Petitioner from the sale of 1000 shares of Radio "A" common stock was "ordinary net income" and not "capital net gain".

THIRD. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the second assignment of error, to-wit :

(2) The determination that capital gain from the sale of capital assets under the requirements of action 101 is reduced to "ordinary net income" because the basis of determining the gain as prescribed in Section 113 (a) (5) sets a date over two years after the date of actual acquisition of the capital assets.

FOURTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the third assignment of error, to-wit:

(3) The determination that the date which governs for gain or loss purposes in Section 113 (a) (5) of the Revenue Act of 1928 must be used in fixing the date of acquisition for capital gain determination under Section 101 (8) of said Act, thereby voiding any previous holding period.

FIFTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the fourth assignment of error, to-wit:

(4) The determination that the petitioner's basis for "capital gain or loss" in the sales in question was limited, reduced and restricted by Section 113 (a) (5) of the Revenue Act of 1928, and that November 3, 1927, is the date which governs the determination of capital net gain or loss.

SIXTH. The Circuit Court of Appeals erred in affirming the Board of Tax Appeals in the eighth assignment of error, to-wit:

(8) The finding of the deficiency for the year 1929 of $35,372.53, in lieu of a determination that there was no additional income tax due from the petitioner for the year in controversy.

Argument.

I. THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL TAX LAW WHICH HAS NOT BEEN BUT WHICH SHOULD BE SETTLED BY THIS COURT.

Under this decision all the inherited personal property throughout the country, except specific bequests, is limited to the date of its distribution for determining the holding period for capital gain purposes if sold prior to the passage of the Revenue Act of 1934. Many taxpayers will be deprived of the capital gain provisions. It is of the utmost importance to many legatees and beneficiaries throughout the United States that a final decision be handed down.

We have been unable to find any case in which this Court has passed upon a similar question. The Board of Tax Appeals in its Memo Opinion in the case of *Lee v. Helvering*, Docket No. 65705, (unreported) (R. 60) indicates that it first passed upon the question in this McFeely case at bar.

There are not less than three other cases raising the same issue now pending in the Second and Eighth Circuits of the Circuit Court of Appeals.

II. UNIFORMITY OF TAXES IN QUESTION.

In view of the different decisions in the First, Third and Ninth Circuits, citizens of various circuits will be subject to a different tax rate on profit from the sale of property held under the same set of circumstances. Capital gain in the First Circuit will be ordinary net income in the Third and Ninth Circuits and the tax must be imposed at different rates unless the question is settled by this Court and a uniform tax thereby established.

III. THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HAS RENDERED DECISIONS ON THE SAME MATTER WHICH ARE IN DIRECT CONFLICT WITH THIS DECISION OF THE THIRD CIRCUIT AND A LIKE DECISION OF THE NINTH CIRUIT.

In the case of *Frances G. Lee v. Commissioner of Internal Revenue* (.... F (2nd) ....) C. C. H. '35 Vol. 3, Par. 9215, which was decided by the Board of Tax Appeals upon authority of the McFeely case at bar (R. 60) the Circuit Court of Appeals for the First Circuit says, in reversing Board of Tax Appeals unpublished Memorandum Opinion:

> "WILSON, J.: This is a petition for review of a decision of the Board of Tax Appeals. The main issue is the same as that involved in the case of *First National Bank of Boston et al. v. United States,* decided by this court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of

the testator, but less than two years from the date of distribution. The Commissioner assessed the gain in accordance with Sec. 113 (a) (5) of the Revenue Act of 1928, but held it was not a capital gain, which was affirmed by the Board of Tax Appeals. Since the acquisition of the securities sold dates back to the death of the testator, *Brewster v. Gage,* 280 U. S. 327; *Chandler v. Field,* 63 Fed. (2d) 13, 15; certiorari denied, 289 U. S. 758; *Walker v. Hill,* 73 N. H. 254; *Sanborn v. Clough,* 64 N. H. 315, they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under Sec. 113 (a) (5). See *First National Bank of Boston et al. v. United States, supra.*"

In the case of *First National Bank of Boston, et al., v. United States of America,* (... F. (2d) ....), C. C. H. '35, Vol. 3, Par. 9214, referred to in *Lee v. Commissioner, supra,* and reversing a like decision in the District Court (7 F. Supp. 915), the Court says:

"Edward E. Blodgett died April 4, 1926. By his will he bequeathed to the petitioners as trustees the residuum of his estate consisting, in part, at least, of securities. Sometime after April 4, 1928, and more than two years after the testator's death, but less than two years after they were turned over to the trustees by the executor of the will, some of the securities were sold by the trustees at a gain of $74,773.08 over their value at the time of distribution, which value, under Sec. 113 (a) (5) of the Revenue Act of 1928, was the basis for determining gain or loss in case of residuary bequests.

The petitioners contend that under the rule laid down in *Brewster v. Gage,* 280 U. S. 327, as to the date of acquisition, and according to the laws of

Massachusetts, the securities had been held by the trustees for more than two years and the gain was, therefore, a capital gain and should have been taxed as such under Sec. 101 (a) of the Act of 1928. The government, however, contends that Congress has a right to determine what shall be considered capital assets and the basis for determining gains and losses; and that, inasmuch as the basis for determining the gain or loss in case of a sale of personal property acquired under a residuary bequest is fixed in Sec. 113 (a) (5) of the same Act as the value at the time of distribution, Congress must have intended that in such case the date from which the two year period is to be computed is also the date of distribution. The government also contends, since the provisions of Sec. 101 (c) (8) B provide that, in determining the period during which a taxpayer has held property, there shall also be included the period for which such property has been held by any other person, provided that under the provisions of Sec. 113 such property has for the purpose of determining gain or loss the same basis, in whole or in part, in the hands of the taxpayer as it would have had in the hands of such other person, that the period during which these securities were held by the executor cannot be added to the time in which they were held by the trustees; since the basis for computing the gain, if sold by an executor, is the value at death of the testator, while in the case of the residuary legatee it is the date of distribution.

It should be noted, however, that the reference in Sec. 101 (C) (8) B is not alone to para. (a) (5) of Sec. 113, but to the entire section, which contains other instances of the arbitrary fixing of the base value for determining gains and losses. This con-

tention of the government is evidently based on the theory that a legatee acquires title from the executor; but since a legatee, whether special or residuary, does not acquire his title from the executor, but under the will, *Brewster v. Gage, supra; Chandler v. Field,* 63 Fed. (2d) 13, 15, certiorari denied, 289 U. S. 758; *Davis v. Newton,* 6 Met. 537, 541; *Hooper et al. v. Bradford,* 178 Mass. 95, 97, Sec. 101 (c) (8) B has no application to this case. Personal property transmitted at death is not held by the representatives of the estate within the meaning of Sec. 101 (c) (8) B. The executor or administrator can only be said to hold it for the limited purpose of administration, or, as has been said, in *autre droit,* or as a quasi trustee for the benefit of the legatees, or heirs. *Lathrop v. Merrill,* 207 Mass. 6, 10.

In *Brewster v. Gage, supra,* the court said, p. 334:

> 'Immediately upon the death of the owner there vests in each of them (referring to a legatee or heir) the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution * * * Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to

them. The legal title so given relates back to the date of the death.'

It is clear that acquisition as used in these Acts means acquisition of title and not of possession.

As the Committee on Ways and Means pointed out in its report to the House No. 704 on the Revenue Act of 1934, with respect to the change in Sec. 113 (a) (5) of the pending bill from that of the Act of 1928:

> 'The change in the 1928 Act was made because there was some doubt as to the meaning of the term "acquisition," which was the term used in the Act of 1926. Since the 1928 Act was passed, the Supreme Court has defined the "date of acquisition" to mean the date of death in the case of all property passing by bequest, devise or inheritance, whether real or personal. (*Brewster v. Gage,* 280 U. S. 327.) Sec. 113 (a) (5) of the bill conforms to the language contained in the Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.'

In the 1921 Act, Sec. 206 (a) (6), it was provided that to constitute capital assets, property must be 'acquired and held' for two years. In subsequent Acts the word 'acquired' has been omitted, the obvious reason is that the word 'acquired' was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

A comparison of corresponding sections in prior Acts: Secs. 206 (a) (6), and 202 (a) (3) of the 1921 Act; Secs. 208 (a) (8) and 204 (a) (5) of the 1924 Act; Secs. 208 (a) (8) and 204 (a) (5)

of the 1926 Act, discloses that capital assets are determined by the time property is 'held,' while gains and losses are computed from the value as a base at the time of acquisition, except in certain instances of an arbitrary fixing of the base value. It was not until the insertion of Sec. 113 (a) (5) in the 1928 Act that any change was made in the base for computing gains between personal property transmitted at death by special bequest and by residuary bequests.

It is significant, however, that even in para. (a) (5) of Sec. 113 of the 1928 Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that, 'If personal property is acquired by specific bequest,' etc., and 'in all other cases, if the property was *acquired either by will or intestacy.*' (Italics supplied.)

Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.

In other words, Congress intended only by the change in Sec. 113 (a) (5) of the 1928 Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial

change in Sec. 101 of that Act from the provisions of Sec. 208 (a) (8) of the 1926 Act for determining what are capital assets.

In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing Sec. 113 (a) (5) of the 1928 Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by Sec. 113 (a) (5) of the Act of 1928 to effect a change in the period during which the property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in Sec. 101 of that Act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also

see Sec. 208 (a) (8) of the 1926 Act, and see Sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 Act.

We find nothing in the decisions in *Helvering v. New York Trust Co.*, 292 U. S. 455, or *Helvering v. Bliss*, 293 U. S. 144, which modifies the rule laid down by the Supreme Court in *Brewster v. Gage, supra*, in construing the sections of the earlier Acts corresponding to Sec. 113 (a) (5). Under the rule laid down in *Brewster v. Gage, supra*, we think the petitioners acquired the corpus of the trust on April 4, 1926, and therefore held it more than two years prior to the sale, and that the District Court erred in holding that under the provisions of Sec. 101 (c) (8) B of the 1928 Act, the taxpayer had not held the securities sold since the death of the testator.

The gain of $74,773.08 resulting from the sale of securities by the trustees, therefore, should have been treated as a capital gain, and in order to determine the total amount to which the petitioners are entitled as a refund, the case must be remanded for a recomputation of the tax in accordance with this opinion.

The judgment of the District Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

In direct conflict with the two decisions *supra*, and in addition to the case at bar, is the case of *Isabel K. Dibblee v. Commissioner of Internal Revenue*, in which the Ninth Circuit of the Circuit Court of Appeals affirms the Board of Tax Appeals decision 29 B. T. A. 1070, and in its opinion not yet reported (.. F. (2) ..) (C. C. H. '35, Vol. 3, Par. 9128), says:

"The controversy arises from an application and interpretation of the provisions of Section 101

and Section 113 (a) (5), which definitely establish both the method of determining the period of holding and the basis for the determination of the taxpayer's gain. They are to be read together and, when done so, on all personal property acquired by specific bequest the basis shall be the fair market value of the property at the time of the death of the decedent, and if the property be acquired either by will or by intestacy the basis shall be the fair market value of it at the time of distribution to the taxpayer. Capital assets, as defined by Section 101 (c) (8) of the Revenue Act means 'property held by the taxpayer for more than two years.' Petitioner asserts that under these provisions of the act the profit resulting from the sale of the securities was 'capital gain' and, consequently, taxable as such, and not as 'ordinary income,' and if correct there would be no deficiency.

The securities upon which petitioner realized a profit of $28,441.86 were the property of decedent at the time of her death, which was more than two years before the date of sale, and were acquired by petitioner as a general bequest of personal property by will, and would seem to be governed by the provision in Section 113 (a) (5) of the act, that

> 'In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.'

But it is argued by petitioner that the laws of California determine the date from which the taxpayer 'held' the securities in question, as under the laws of that State the legal title to property transmitted by will or intestacy vests immediately upon

the decedent's death in the devisee, legatee or heir, as the case may be. We cannot agree with the correctness of the contention, for the Federal statute determines the time the taxpayer 'acquired' personal property, when acquired as a general bequest by will, to be at the time of the distribution to the taxpayer, and not at the time of decedent's death. Therefore, the taxpayer is considered as 'holding' the securities only from the time of distribution. The purposes or effect of the revenue laws of the United States cannot be contravened by state law. *Burk-Waggoner Assn. v. Hopkins,* 269 U. S. 110; *Weiss v. Wiener,* 279 U. S. 333; *Corliss v. Bowers,* 281 U. S. 376, 378.

The decision of the Board of Tax Appeals is affirmed."

In the case of McFeely v. Commissioner at bar the Third Circuit affirmed the Board of Tax Appeals decision which is in direct conflict with the decisions of the First Circuit.

See opinion of Board of Tax Appeals (R. 23).

From the above decisions it is plainly apparent that the Circuit Courts of different Circuits have decided the same question in opposite ways, and that it will require a decision of this Court to finally settle the issue in this case and all the other cases in which appeals are now pending, as well as the cases not yet passed upon by the Commissioner of Internal Revenue.

IV. THIS DECISION OF THE CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE WEIGHT OF AUTHORITY AND WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Board of Tax Appeals and the Third and Ninth Circuit Courts in affirming them have taken the narrow untenable position that in decedents' estates no property right existed which could be interpreted as "being held" by the distributee until reduced to possession by distribution. In both cases they decided the distributees had not held the assets within the meaning of Section 101 for a period of two years before they were sold and that the two year period commenced to run from the date of distribution, when the petitioners actually acquired physical possession of the personal property.

This is in direct conflict with the decision in *Brewster v. Gage*, 280 U. S. 327, in which this Court says:

> "The decree of distribution confers no new right, it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of death."

The Supreme Court thus sustained one of the rules of property which exists in most of the States that title to property passing by bequest, devise or inheritance is acquired at the date of decedent's death.

The Ninth Circuit Court, however, in *Dibblee v. Commissioner, supra*, says:

> "We cannot agree with the correctness of this contention (that the legal title to such property vests upon decedent's death as held in *Brewster v. Gage, supra*) for the Federal statute determines the time the taxpayer 'acquired' personal property,

when acquired as a general bequest by will, to be at the time of distribution to the taxpayer, and not at the time of decedent's death."

This interpretation of Sections 101 and 113 can only be from a strained inference and not from the actual wording of the provisions "capital assets means property held more than two years", and "if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer". It cannot be supported by giving the words used in these provisions their usual and ordinary meaning and this is the meaning required to be given statutes in their interpretation by the Supreme Court as decided in *DeGanay v. Lederer*, 250 U. S. 376, in which the Court said at page 381:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and within the meaning commonly attributable to them."

The word "held" as used in regard to property, as in Section 101 (c) (8), means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by the taxpayer. The word "acquire" means "to get or gain", "to get as one's own", or "to get as one's own, as to acquire a title". These meanings appear in the standard dictionaries without qualification.

Thus it would appear that the Ninth Circuit Court has placed an unusual, limited and restricted meaning on the words "held" and "acquired" in the statute in determining that under Sections 101 and 113 personal property acquired as a general bequest by will, is not acquired at decedent's death but is acquired at time of distribution, and to decide therefore that the taxpayer

is considered as "holding" the securities only from the time of distribution.

The Ninth Circuit Court dismisses these decisions of the Courts concerning the property of estates of decedents by citing certain cases to show that the purposes and effect of the revenue laws of the United States cannot be contravened by state law.

In *Burk-Waggoner Association v. Hopkins*, 269 U. S. 110, cited, the Supreme Court decided Congress could determine how and at what rate the income of a joint enterprise shall be taxed regardless of the state laws governing the creation and operation of such joint enterprise..

In *Weis v. Wiener*, 279 U. S. 333, cited, the Supreme Court decided a lessee of realty under 99 year leases was not entitled to deduction in his income tax for estimated obsolescence for which he had not paid.

In *Corliss v. Bowers*, 281 U. S. 376, cited, the Supreme Court decided that a grantor of a revocable trust could be taxed on the income therefrom.

In citing these cases the Circuit Court failed to recognize that the issues therein raised and determined were not concerning the basic rules of property and that as the Court said in *Harmel v. Commissioner*, 56 F. (2d) 153, "It is no new doctrine that a rule of property prevailing in a state, and changes in that rule, will be recognized in administering the federal income tax law. *United States v. Robbins*, 269 U. S. 315."

And further as said in *Johnson v. Commissioner*, 56 F. (2d) 58, "State laws do not control federal taxing statutes unless creating a rule of property."

The Third Circuit Court in the McFeely case at bar limited themselves in their *per curiam* opinion to affirming the order of the Tax Board without discussion (R. 56).

The Board of Tax Appeals, however, recognized the rule of property as set up in *Brewster v. Gage*, 280 U. S. 327, saying in the opinion (R. 27):

> "The widow, on July 3, 1919, elected to take against the will of her deceased husband, one-half of the estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one-half of the estate of her deceased husband vested in her immediately and absolutely. *Re Greiner's Appeal*, 103 Pa. 89.",

but they immediately fell into error by drawing a distinction between the equitable title and actual possession in defining the holding period for capital assets, saying in their opinion (R. 28-29):

> "She sold shares of stock which were distributed to her by the executors of the Estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the executors of the estate and not in the petitioner. In view of these facts we think that it cannot be said that the petitioner held them for a period of two years at the date of sale."

Thus, although the time of acquisition of title as defined under the state laws was originally made the ruling element in determining "capital assets", and remains the ruling element in all other cases, the Board has placed an unusual and restricted meaning on the words in the statute, in so far as residuary property of a decedent is concerned, and decided that this property is not acquired or held until physical possession is de-

livered at the time of distribution for the purpose of determining whether or not it is a "capital asset".

Physical control and possession has never been considered an essential element in the definition of the word "held" as used in the Capital Gain Section 101 except in the case at bar. The Respondent and the Board of Tax Appeals have not held possession, dominion and control for two years to be requisite in stock dividends, stock subscription rights, stock purchased on margin, interests in stock exchange memberships issued to old members, agreements to purchase stock, and agreements to purchase real estate where the original source of title was acquired more than two years before sale.

Thus singling out residuary estates respondent and the Board of Tax Appeals attempt to amend the capital gain provisions of the Act of 1928, Section 101, by reading into it "capital assets means property *the physical possession, dominion and control of which has been* held for more than two years," because the basis of gain or loss in Section 113 has been changed in the 1928 Act to date of distribution, and it would be inconsistent to have two dates for these two different purposes.

This construction is without precedent and unwarranted and results in an absurd and unjust penalty to petitioner. If she had sold the stock in question on December 31, 1927, she would have been entitled to the capital gain rate on her profit, because *Brewster v. Gage supra*, established that the property was acquired at the date of decedent's death and she and her donor would have held it more than two years, but if she sold on a day later, January 1st, 1928, she is deprived of the capital gain rate and must pay the ordinary net income rate because the Court decides she holds it from date

of distribution, notwithstanding the fact that, although the gain and loss section was charged, the capital gains section was re-enacted in the Revenue Act of 1928 without change. The penalty is imposed by an interpretation and not by an actual amendment.

We respectfully submit that the Board of Tax Appeals has not offered any legal basis to support this radical determination.

In direct contrast the First Circuit Court in its opinions in *The First National Bank of Boston et al. v. United States of America, supra,* and in *Frances G. Lee v. Commissioner, supra,* has discussed at considerable length the capital gain and gain and loss sections of the Revenue Acts from 1921 to 1928 and their application to the questions involved in following out the principles determined in *Brewster v. Gage, supra.*

We endorse the sound reasoning of the First Circuit Court that under authority of *Brewster v. Gage, supra,* the legatee or distributee does not acquire his title from the executor or administrator, but under the will or under the intestate laws, and title vests as of the date of decedent's death; that acquisition as used in these Acts means acquisition of title and not of possession; that Sections 101 and 113 were enacted for entirely different purposes, the first defining capital assets and capital gains, and the second defining the method of determining the amount of the gains, whether capital gains or ordinary net income, and that these sections are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer; that since the acquisition of the securities sold dates back to the death of decedent they were held more than two years and should be so treated in assess-

ing the tax as a capital gain although the amount of the gain was properly determined under Section 113 (a) (5).

Nothing has been said by the Ninth Circuit Court or the Board of Tax Appeals which can be used to refute the sound reasoning and conclusions of the First Circuit Court and we submit it is plainly evident that the decision of the Third Circuit Court of Appeals in the case at bar is against the weight of authority and in conflict with the applicable decisions of other Circuit Courts and of the Supreme Court of the United States.

Conclusion.

We submit that the weight of authority supports our specifications that the Circuit Court of Appeals for the Third Circuit erred in affirming the Board of Tax Appeals' decision that the date which governs for gain or loss purposes must be used in fixing the date of acquisition for capital gain determination; that petitioner had not held the stock sold for more than two years from the date of distribution; that the stock was therefore not a capital asset and that the profit realized by her from the sale thereof was "ordinary net income", and the said Court further erred in affirming the decision that the petitioner was therefore liable for an additional income tax of $35,312.53 for the year 1929.

In view of the fact that this is an important question of federal tax law which has not been decided by this Court, and which petitioner contends has been decided in error against the weight of authority and in conflict with applicable decisions of this and other Courts, and in view of the conflicting opinions of the

Circuit Courts on the identical question, we submit that this case should be reviewed and the question at issue finally settled by your Honorable Court.

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